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In The

Supreme Court of the United States

October Term, 1993

CHICAGO TRUCK DRIVERS, HELPERS AND WAREHOUSE WORKERS UNION (INDEPENDENT) PENSION FUND, *et al.*,

Petitioners,

v.

FERN SLOTKY,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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11 pp

QUESTION PRESENTED

Should the spouse of the owner of a business which incurred withdrawal liability under ERISA be personally liable for that withdrawal liability solely by reason of the marital relationship?

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondent accepts the descriptions of the Jurisdiction, Statute and Regulations Involved and Statement of Facts involved in this case, which appear on pages 2 through 6 of the Petition.

Respondent strongly disagrees, however, with the statement of the Question Presented which appears on page (i) of the Petition. Neither the holding of the Seventh Circuit below nor the position of the Respondent requires any finding of a "significant interest" in a trade

or business. Rather, Respondent argues that where neither ownership of business assets nor participation in *any* business is alleged, there can be no spousal liability.

REASONS FOR DENIAL OF THE PETITION

I. THERE IS NO CONFLICT WITH OTHER COURTS OF APPEALS AS TO THE PROPER INTERPRETATION OF THE REGULATION IN QUESTION.

The sole question presented is whether 29 U.S.C. §1301(b) and the so-called "Attribution Rules" promulgated by the Pension Benefit Guaranty Corporation ("PBGC"), pursuant thereto, 29 C.F.R. §2612.1 and § 2612.2, dictate the result Petitioner desires.

Petitioner argues that the decision of the Seventh Circuit is in conflict with *Western Conference of Teamsters Pension Trust Fund v. LaFrenz*, 837 F.2d 892 (9th Cir. 1988). Petitioner is incorrect; the holdings in *LaFrenz* and in this case are completely consistent. In *LaFrenz*, the husband owned the controlling stock in a corporation (Pre-Mix Concrete, Inc. or "Pre-Mix") which had incurred withdrawal liability. In addition, he *and his wife* owned as proprietors an unincorporated truck leasing business. The court did indeed state that "whether Anita LaFrenz actually had an ownership interest in Pre-Mix is immaterial." *Id.* at 894. Respondent agrees. Respondent disagrees, however, with the Petitioner's illogical leap to the notion that it is also immaterial whether the wife actually had an ownership in the unincorporated truck leasing business; Mrs. LaFrenz clearly did and that distinction is crucial in distinguishing the two cases.

The purpose of the Attribution Rules is clearly stated in 29 C.F.R. §2612.1:

> "The purpose of this part is to prescribe regulations to determine the trades or businesses that shall be treated as a single employer for purposes of Title IV of the Act."

Thus, in the typical case involving the Attribution Rules, two trades or businesses *with differing ownership* are present. The question which the Attribution Rules addresses is whether these two businesses are to be treated as a single employer for purposes of determining whether they are jointly liable for the withdrawal liability of one of them, as is dictated by 29 U.S.C. §1301(b). That will depend on whether the two trades or businesses are "under common control," and the Attribution Rules prescribe a method of determining whether they in fact are under common control.

In the case at hand, there are two businesses in question:

1. Stevens Bedding, Inc., a corporation wholly owned by Respondent's husband, Burton Slotky, and the business which incurred withdrawal liability.

2. An unincorporated business owned and operated by Burton Slotky, which leased real estate.

The Respondent is not alleged to have any interest whatsoever in either business. There is no reason to resort to any Attribution Rules to reach the conclusion that *both businesses* are under common – in fact *identical* – control and thus should be treated as a single employer. The

inquiry is at an end simply by stating the facts. Thus, the Attribution Rules, whose purpose is "to determine the trades or businesses that shall be treated as a single employer . . . ," are unnecessary to reach the proper result.

The contrast with *LaFrenz* is stark. There the two businesses were as follows:

> 1. Pre-Mix, a corporation *owned solely by the husband, Mr. LaFrenz,* which had incurred withdrawal liability.
>
> 2. An unincorporated business owned *jointly by Mr. LaFrenz and his wife.*

Since the husband did not own both businesses entirely (presumably owning only 50% of the unincorporated business), resort was necessary to the Attribution Rules to determine whether the unincorporated business was in fact under common control with the Pre-Mix. Since under those Rules the husband was deemed to own the interest of his wife in the unincorporated business, they were found to be under common control.

To suggest, therefore, that *LaFrenz* is in conflict with the Seventh Circuit in this case is to ignore the interest of Mrs. LaFrenz in the unincorporated business. Mrs. Slotky, the Respondent, owns no interest in the property or the trade or business constituting the unincorporated leasing business. Petitioner has asserted liability against Mrs. Slotky – a total stranger to both businesses – solely by reason of *her* status as Burton Slotky's wife and *his* ownership of an unincorporated business. Mrs. LaFrenz, however, was indisputably the owner of an interest in an unincorporated trade or business and as such an owner

was liable for its debts. Thus, the two holdings are perfectly consistent.

The other cases cited on pp. 9 and 10 of the Petition, *Board of Trustees of Trucking Employees of North Jersey Pension Fund v. Centra*, 983 F.2d 495 (3rd Cir. 1992) and *IUE AFL-CIO Pension Fund v. Barker & Williamson Inc.*, 788 F.2d 118 (3rd Cir. 1986) have absolutely nothing to do with spousal liability or any concept remotely analogous thereto. Further, *Central States Pension Fund v. Ditello*, 974 F.2d 887, 891 n.1 (7th Cir. 1992) did appear to adopt, *in dicta*, the interpretation of the Rules espoused by Petitioner, but (a) that position was subsequently rejected by the same court which had decided *Ditello* in *Central States Pension Fund v. Johnson*, 991 F.2d 387 (7th Cir. 1993) and (b) as noted in Respondent's Motion to Dismiss, R. 7 and 8, the attorney for Mrs. Johnson failed even to argue to the court that such an application of the Attribution Rules was improper.

II. THE DECISION BELOW RAISES NO SIGNIFICANT PROBLEMS CONCERNING THE COLLECTION OF WITHDRAWAL LIABILITY.

Petitioner raises the specter that to deny the Petition and fail to reverse in this case would have an "untoward effect" on the ability of pension plans and the PBGC to collect unfunded liabilities. Petition at 14-15. While it would be futile to dispute Petitioner's tautological assertion that it would enhance the revenue producing capacity of multi-employer plans and PBGC to make wives liable for the withdrawal liability of their husbands simply because of their status, it would also be true that the

collection of multi-employer plans' withdrawal liability would also be enhanced by making, say, children, siblings and cousins jointly liable for such liability.[1]

To focus on the revenue enhancement effects of the opinion below of course evades the question which must be answered – what is the meaning of 29 U.S.C. §1301(b)(1), pursuant to which the Attribution Rules were adopted? The answer to that question is unmistakable: trades or businesses which are under common control are liable jointly for the withdrawal liability of any one of them.

Respondent's position, and the holding of the court below, is simple – in order for Respondent to be liable for any ERISA withdrawal liability under §1301(b), she must be found to have participated as an owner in an *unincorporated* trade or business for whose debts under federal or state common law, she would be personally liable. Since there is no such participation, she cannot be held liable.

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[1] It is interesting to note that the PBGC, the author of the Attribution Rules, had a recent opportunity to adopt the position taken by Petitioner and declined to do so. *See* Brief of *Amicus Curiae* of PBGC in *Central States Pension Fund v. Johnson*, *supra*, (No. 92-1088) which argued for a rule which required a determination under federal common law of whether the wife was actually associated in some way with an unincorporated trade or business, other than merely by reason of her status as the spouse of the owner thereof.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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